1933

JADU TELI v. MAHBOOB RAZA KHAN

party. In this particular case the appellant would not be in a better position by having a third litigation being forced on him. For these reasons I am of opinion that the condition imposed on the 31st of July, 1930, has been sufficiently complied with.

Mukerji, J.

Coming to the second point, it was certainly open to the court to restore the suit with the consent of the parties. The application of the plaintiff to restore the suit might be treated as an application for review of judgment, and such an application could certainly be granted by the consent of the contesting defendant.

The result is that the order passed by the court below is good.

I have not considered it necessary to discuss the several rulings cited before us in detail. Some of these cases have been decided on the peculiar facts involved in them. Others show a sharp distinction of opinion. It may, therefore, be definitely said that much can be said on both sides. But I am of opinion that more can be said on behalf of the respondent in this case than on behalf of the appellant.

I, therefore, agree in dismissing the appeal.

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

1933
August, 7

BENI PRASAD (APPLICANT) *v.* PARBATI (OPPOSITE PARTY)*

Guardians and Wards Act (VIII of 1890), sections 9 and 39(h) —Application for guardianship—Jurisdiction—Where minor resides or his property is situate—Not necessary that the applicant must be a resident within the jurisdiction of the court.

Under section 9 of the Guardians and Wards Act an application for guardianship cannot be entertained by a court within whose jurisdiction neither the minor resides nor any part of the property of the minor is situate.

There is nothing in the Guardians and Wards Act which debars a court from appointing as guardian a person who is not residing within the jurisdiction of the court, and an

*First Appeal No. 140 of 1932, from an order of Ganga Nath, District Judge of Aligarh, dated the 9th of April, 1932.

application for guardianship cannot be thrown out on the sole ground that the applicant does not reside within the jurisdiction of the court to which the application is made. Section 39(*h*) of the Guardians and Wards Act applies in terms to the removal and not to the appointment of a guardian; nor does it lay down that the court must remove a guardian who has ceased to reside within the jurisdiction of the court. All that it lays down is that the court may remove a guardian, *inter alia*, on that ground. In making an appointment as guardian the court may give due weight to the circumstance that the applicant does not reside within the jurisdiction of the court, but that circumstance does not imply that the person is not entitled to make the application or that the court is not competent to entertain it. *Asghar Ali* v. *Amina Begam* (1), not approved.

Mr. *Gopi Nath Kunzru*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondent.

RACHHPAL SINGH, J.:—The order in this case (First Appeal from order No. 140 of 1932) will also govern and dispose of Civil Revision No. 543 of 1932.

Beni Prasad is the uncle of one Mst. Shanti who is a minor. Mst. Parbati, the own sister of the minor, is the wife of one Yagudatta. The minor, who lives with them, owns some movable property which is in the hands of Mst. Parbati and her husband, who both reside at Hathras which is within the jurisdiction of the District Judge of Aligarh. Beni Prasad made an application to the District Judge of Agra where he himself resides, praying that he should be appointed to act as guardian of the person and property of the minor. The learned District Judge of Agra found that at the time the application was made by Beni Prasad the minor was residing at Hathras and her property was in possession of her sister and sister's husband at that place. He therefore held that the court having jurisdiction was the District Judge of Aligarh and returned the application to Beni Prasad for presentation to the court having jurisdiction. Beni Prasad thereupon presented the

(1) (1914) I.L.R., 36 All., 280.

1933

BENI PRASAD v. PARBATI

Rachhpal Singh, J.

application to the learned District Judge of Aligarh, who, relying on clause (*h*) of section 39 of the Guardians and Wards Act and a ruling of this Court in *Asghar Ali* v. *Amina Begam* (1), held that Beni Prasad, who did not reside within his jurisdiction, was not competent to make the application, which was consequently dismissed by him. Beni Prasad has filed a revision application against the order of the learned District Judge of Agra and has preferred an appeal against the order of the learned District Judge of Aligarh.

We have heard the learned counsel on both sides. In my opinion the order of the learned District Judge of Agra is correct and is not open to objection. Section 9 of the Guardians and Wards Act provides that if the application is with respect to the guardianship of the person of the minor then it should be made to the court having jurisdiction in the place where the minor ordinarily resides, and if the application is in respect of the property of the minor then it should be made either to the court in whose jurisdiction the minor ordinarily resides or to the court having jurisdiction in the place where the property is. Now, in the case before us the minor resides within the jurisdiction of the Aligarh court and her property is also in the same district. Under clause (3) of section 9 of the Guardians and Wards Act the learned District Judge was justified in returning the application to Beni Prasad for presentation to the Aligarh court. So, the revision application of Beni Prasad against the order of the learned District Judge of Agra must be dismissed.

The next question for consideration is whether the view taken by the learned District Judge of Aligarh is a correct one. Admittedly, Beni Prasad, applicant, does not reside within the jurisdiction of the Aligarh court in which the minor resides at present and where her property is. The view taken by the learned District Judge is that the person applying to be appointed

(1) (1914) I.L.R., 36 All., 280.

guardian must reside within the jurisdiction of the court to which he makes the application. I find myself unable to agree with this view. In my opinion, there is nothing in the Guardians and Wards Act which debars a court from appointing a guardian who is not residing within the jurisdiction of the court to which an application is made. Under section 7 of the Guardians and Wards Act a court will appoint a guardian wherever it is satisfied that it is for the welfare of the minor that an order should be made. Under section 8 of the Act any friend or relative can apply to be appointed as a guardian. It is nowhere laid down that a person not residing within the jurisdiction of the court to which the application is made will be incompetent to make the same. The District Judge relies on clause (*h*) of section 39 of the Act. The section mentions some of the grounds on which the court may remove a guardian, and clause (*h*) says that one of the grounds for removal may be that the guardian has ceased to live within the jurisdiction of the court which had appointed him a guardian. I do not think that clause (*h*) implies that a person applying for appointment must be residing within the jurisdiction of the court to which the application is made. What clause (*h*) means is that in certain cases ceasing to live within the jurisdiction of the court which made the order of appointment may be a ground for the removal of the guardian from his office, and no more. The learned District Judge in his order relies on the ruling in *Asghar Ali* v. *Amina Begam* (1). I have read this case. At one place in their judgment the learned Judges make the following observations: "We might also refer to clause (*h*) of section 39 of the same Act, which shows that the legislature contemplates that an applicant for guardianship should reside within the jurisdiction of the court to which he makes the application." These remarks were merely *obiter dicta*. The appeal of Asghar Ali, the man who wanted

(1) (1914) I.L.R., 36 All., 280.

1933

BENI PRASAD v. PARBATI

Rachhpal Singh, J.

to be appointed a guardian, failed on another ground as will be seen from the following remarks: "The appeal of Asghar Ali must also fail, but on another ground. He admittedly lives in the district of Meerut, and according to him Mst. Anwari Begam also ordinarily resides with him in that district. If so, the application with respect to the guardianship of the person of the minor should have been made to the District Judge of Meerut, and that with respect to the guardianship of the property of the minor either to the District Judge of Meerut or Moradabad." Asghar Ali had applied for his appointment as guardian of the persons and the property of the minors to the District Judge of Moradabad though he had contended that the minors lived with him at Meerut. In my opinion the only duty cast on the court under the Act is to appoint the best person to act as guardian, regardless of his place of residence. If the law were that only a person residing within the jurisdiction of the court could be appointed a guardian then in some cases the consequences may be disastrous, as it may permit an unscrupulous person to prevent the well-wishers of the minor from being appointed guardian by inducing the minor to remove himself and his property from the district in which his friends and relations most competent to act as his guardian reside. To me it is unthinkable that the Act could possibly have contemplated that a person not residing within the jurisdiction of the court to which the application for guardianship is made should not be competent to make the application for guardianship. There is nothing in the Act itself to support this view. I am, therefore, of opinion that the District Judge of Aligarh had jurisdiction to entertain the application of Beni Prasad.

I, therefore, allow the appeal of Beni Prasad, set aside the order passed by the learned Judge of Aligarh and send back the case to him with directions that he should entertain the application of Beni Prasad and

then decide as to who should be appointed to act as guardian of the person and the property of the minor.

NIAMAT-ULLAH, J.:—I concur with my learned colleague in the order he proposes to pass. The finding of the learned District Judge of Agra implies that the minor did not ordinarily reside within his jurisdiction and that no part of her property was within his jurisdiction. In this view, Beni Prasad's application for guardianship of the person and property of the minor could not be entertained by the District Judge of Agra.

Niamat-ullah, J.

His application to the District Judge of Aligarh, within whose jurisdiction the minor ordinarily resides and has property, has been thrown out on the ground that the applicant cannot be appointed guardian, having regard to the provisions of section 39 (*h*) of the Guardians and Wards Act, which in terms applies to removal and not appointment. It provides that a guardian may be removed, *inter alia,* on the ground that he has ceased to reside within the local limits of the jurisdiction of the court. As my learned brother has shown in his judgment, there is nothing in law to prevent a person, not residing within the jurisdiction of the District Judge within whose jurisdiction the minor ordinarily resides and has property, from being appointed as guardian of the person and property. At the same time, if such a person is appointed, the ground on which he can be removed exists. The learned District Judge seems to think that there is a disqualification attaching to a person residing outside the jurisdiction of the District Judge before whom he applies for appointment. The fallacy lies in the assumption that section 39 (*h*) absolutely disqualifies a guardian from continuing to act as such if he ceases to reside within the local limits of the jurisdiction of the court in which the minor resides or has property. All that section 39 (*h*) lays down is that the court may remove a guardian, *inter alia,* on the ground that he does not reside within its jurisdiction. It is not correct to say that the court must

1933

BENI PRASAD v. PARBATI

Niamat-ullah, J.

remove such guardian. Ordinarily it is undesirable that a person who has ceased to reside within the jurisdiction of the court should continue to act as a guardian. In a fit case, however, it is open to the District Judge not to remove a guardian though he has ceased to reside within the local limits of his jurisdiction.

In the case before us, the minor is living with her sister within the jurisdiction of the District Judge of Aligarh; and if she is a rival claimant to the appointment as guardian, the disability under which Beni Prasad is labouring may have a material bearing on the choice to be made by the Judge. The only question which the learned District Judge decided and which we are called upon to decide in this appeal is whether Beni Prasad is absolutely debarred from making an application for appointment as guardian, and whether the learned District Judge is not competent to entertain his application. In my opinion the view taken by the learned District Judge is not sound. Beni Prasad's application should have been entertained and disposed of on the merits. There is nothing in *Asghar Ali* v. *Amina Begam* (1) which militates against the view which we are taking. The remark that "the legislature contemplates that an applicant for guardianship should reside within the jurisdiction of the court to which he makes the application" does not imply that the person is not entitled to make an application or that the Judge is not competent to entertain it. The learned Judges merely indicated their view that ordinarily a person not residing within the jurisdiction of the District Judge should not be appointed. This does not negative the proposition that a person not residing within his jurisdiction can apply, but in making his appointment the court will give due weight to that circumstance. In exceptional circumstances the court may have no alternative but to appoint such a person. For these reasons I agree to the order of my learned colleague.

(1) (1914) I.L.R., 36 All., 280.